

CAUSE NO. PD-0059-20

TO THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
1/31/2020  
DEANA WILLIAMSON, CLERK

JAMES BERKELEY HARBIN, II,  
Appellant

VS.

THE STATE OF TEXAS,  
Appellee

APPEAL FROM DALLAS COUNTY

COURT OF APPEALS  
FIFTH DISTRICT OF TEXAS  
AT DALLAS

CAUSE NO. 05-18-00098-CR

§§§§§§§§§§

**REPLY TO STATE'S  
PETITION FOR DISCRETIONARY REVIEW**

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**TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:**

**COMES NOW** James Berkeley Harbin, II, appellant herein, and respectfully submits this his Reply to State’s Petition for Discretionary Review and would show the Court as follows:

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant agrees with the State that oral argument is not necessary in this case.

## **STATEMENT OF THE CASE**

The State has correctly presented the history of this case including the original conviction, habeas relief granted, and subsequent punishment hearing and sentence. The State also correctly notes, including by appendix, that the court of appeals held that appellant's sole complaint on appeal about charge error was meritorious and the error was harmful. The State also explains that the State's Motion for Rehearing was denied but does not inform the Court that the motion was denied because the State had forfeited the defensive position presented in the Motion because that position had not been presented in the State's original brief.

## **ARGUMENT**

### **THE STATE FORFEITED THE RIGHT TO ARGUE A DEFENSIVE POSITION NOT PRESENTED IN THE BRIEF FILED PRIOR TO THE RENDERING OF THE DECISION OF THE COURT OF APPEALS**

On initial appeal appellant presented a single issue for review by the court of appeals:

### **THE DISTRICT COURT COMMITTED ERROR IN OVERRULING APPELLANT'S OBJECTION TO THE OMISSION OF A MITIGATION INSTRUCTION**

The State responded with the following defensive positions in alternative arguments:

**Appellant failed to preserve this issue for appellate review. In the alternative, the trial court did not err in overruling Appellant's request for a sudden-passion jury instruction. Moreover, Appellant was not harmed by any error.**

It was not until after the court of appeals decision was delivered that the State's Motion for Rehearing raised the following defensive position:

**This Court (of Appeals) erred by determining that the trial court erred in refusing to include a sudden-passion instruction in the jury charge at Appellant's 2017 retrial on punishment for a murder he committed in 1990 because the savings provision in the 1993 Act amending the penal code provides that it was not the law applicable to the case.**

In the State's Motion for Rehearing the State made the following concession:

**[N]either Appellant nor the State raised the argument in their briefs on direct appeal, under the savings provision applicable to the 1994 amendment to section 19.02 of the penal code, sudden-passion was not the law applicable to the case, regardless of whether the change in the law was procedural or substantive.**

State's Motion for Rehearing, at p. 1-2.

The State's Motion for Rehearing was overruled by the court of appeals on December 18, 2019 with citation to a single case supporting the ruling: *Rochelle v. State*.

The State's Petition for Discretionary Review does not complain that the court

of appeals incorrectly ruled against the State's defensive positions raised on initial submission of the briefs of the parties. Rather, the State complains in its petition that the court of appeals' decision was erroneous on the defensive position taken by the State in its Motion for Rehearing. The State does not address the issue that the argument made therein was never addressed by the court of appeals and is not part of the decision for which the State seeks review by this Court.

This Honorable Court has repeatedly and consistently held that a petition for discretionary review should specifically address only error(s) in the court of appeals' holding. *Gregory v. State*, 176 S.W.3d 826, 827 - 28 (Tex. Crim. App. 2005); *Degrade v. State*, 712 S.W.2d 755 (Tex. Crim. App. 1986) (per curiam); *State v. Consaul*, 982 S.W.2d 899, 902 (Tex. Crim. App. 1998) (Price, J., concurring) ("This court's jurisdiction is limited to review of decisions by the courts of appeals."); *King v. State*, 125 S.W.3d 517, 518 (Tex. Crim. App. 2003) (Cochran, J., concurring statement) (citing *Degrade*, 712 S.W.2d at 756). Historically this Honorable Court will refuse a petition for discretionary review that does not directly attack the holding of the court of appeals. *Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995).

It is appellant's position that the State has failed to preserve the merits of the defensive position presented for the first time in its Motion for Rehearing. This argument has not been presented to the court of appeals and has not been addressed

by the court of appeals. Such is not a proper matter for discretionary review. The State's complaint raised at this stage of the proceedings comes too late. *Rochelle v. State*, 791 S.W.2d 121 (Tex. Crim. App.1990); *Farrell v. State*, 864 S.W.2d 501 (Tex. Crim. App.1993). Nothing prevented the State from raising the defensive position presented in its Motion for Rehearing in its brief on original submission. The Court of Criminal Appeals only reviews "decisions" of the courts of appeals; this Court does not reach the merits of any party's contention when it has not been addressed by the lower appellate court. *Lee v. State*, 791 S.W.2d 141 (Tex. Crim. App.1991).

A court of appeals is not required to entertain a State's contention for the first time in a motion for rehearing. If the court of appeals does not entertain the contention made in a motion for rehearing, the Court of Criminal Appeals has no "decision" to review. *Sotelo*, 913 S.W.2d at 508 - 09. The State's Petition for Discretionary does not even posit an argument as to why this Court should grant review of a matter not presented to or decided by the court of appeals.



**PRAYER FOR RELIEF**

**WHEREFORE, FOR THE FOREGOING REASONS,** the State's Petition  
for Discretionary should be summarily denied.

Respectfully Submitted,

*/s/ Lawrence B. Mitchell*

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## **CERTIFICATE OF WORD-COUNT COMPLIANCE**

The undersigned attorney hereby certifies, in compliance with **TEX. R. APP. PROC. 9.4 (I) (B) (2)** that this document contains 912 words, including all contents except for the sections of the brief permitted to be excluded by **TEX. R. APP. PROC. 9.4 (I) (1)**.

/S/ Lawrence B. Mitchell

**LAWRENCE B. MITCHELL**

## **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing reply brief has been served on January 30, 2020 via e-mail or certified electronic service provider to:

Hon. Stacey Soule  
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/S/ Lawrence B. Mitchell

**LAWRENCE B. MITCHELL**